The House affirmed the majority decision of the Court of Appeal that where a person dies in consequence of a defendant's negligence before he can bring a claim for damages or obtain judgment, his estate is entitled to recover damages under section 1 of the Law Reform (Miscellaneous Provisions) Act, 1934 for the loss of earnings for the 'lost years', for the recovery of such damages is not excluded by section 1(2)(c) of the Act.

So it is that after 46 years the law in England was changed in *Gammell's* case. But the House also said that its decision is "neither sensible nor just". It said that Parliament should correct by legislation that a claim for loss of earnings for the 'lost years' does not survive the death of an injured person.

The question is whether the principle of law in *Gammell's* case should be given effect to in Singapore, as our section 8(2) of the Civil Law Act (Cap. 30) is similar in wording to section 1(2)(c) of the English Act. It is true, as was submitted for the defendant that *Gammell's* case is not binding on me, but ordinarily, because decisions of the House of Lords are always treated with respect in our courts, I would follow it as there is nothing in the facts of the case before me to distinguish it from *Gammell's* case. In this instance, however, there are the observations of the Law Lords; there are also arguments, which but for *Pickett's* case would have found favour with them (see the dissenting judgment of Megaw L.J. in the Court of Appeal); and, as the facts before me well illustrate, there are immense practical difficulties in giving effect to the decision. It is for these reasons that I hesitate to incorporate into our law relating to damages for death recoverable by the estate of the deceased the principle of law in *Gammell's* case. At the hearing I did not say "aye" or "nay" to the submission.

I now deal with the facts. As the issue relates to damages only, it is sufficient to say that the deceased died from injuries he had sustained in an accident between a military truck, in which he was travelling, and a motor lorry. He was 20 years of age. He was in national service. As a soldier, he received a gross monthly pay of $122.47. His mother's evidence is that he gave her $60 every month. As against that evidence the father said that his son from time to time asked his mother for money. On another topic, the mother said that her son had told her that he was going to sign on as a regular for 6 years. But she also said that he had attended night classes doing an electrical course, the inference being that he was going to be an electrician.

I found the available evidence for assessment of damages meagre and contradictory. On the evidence I was unable to say what the deceased was going to do or how much he would earn in his normal working lifespan. It was not possible therefore even to begin to make an estimate of the probable future earnings of the deceased. So then, it was impossible to assess a fair compensation for the 'lost years'. I therefore dismissed the plaintiff's claim.

Claim dismissed.

Solicitors: *Murphy & Dunbar; Chan, Goh & Co.*

MALAYSIAN REPORTS

GREAT SUN TRADING CO. v. FOO YIN PENG & ANOR.

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Salleh Abas F.JJ.) July 6, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 82 of 1977]

Practice and Procedure — Appeal — Appeal from Sessions Court — Question of fact — Conflicting evidence — Oral agreement — Principles on which appellate court should act in reviewing finding of fact.

In this case the respondents alleged that they had agreed to purchase plastic brushes to be imported from Taiwan from the appellants. They paid a total of $4,320 for the purchase price of the brushes and in default of delivery claimed the return of the purchase price. The learned Senior President of the Sessions Court after hearing the parties held that no relationship of buyer and seller existed between the parties. She dismissed the claim of the respondents. On appeal the learned Judge of the High Court allowed the appeal and gave judgment for the respondents. The appellants appealed.

Held: (1) in this case the learned President of the Sessions Court had made a specific finding of fact and the learned Judge should not have disturbed such finding;

(2) the onus was on the plaintiffs/respondents in this case and as they had failed to discharge the onus, the claim was rightly dismissed;

(3) in the absence of grounds of judgment of the learned Judge it was difficult to know the reasons for upsetting the finding of facts by the lower court.

Cases referred to:-

(1) *Benmax* v. *Austin Motor Co. Ltd.* [1955] 1 All E.R. 326.

(2) *Chow Yee Wah & Anor.* v. *Choo Ah Pat* [1978] 2 M.L.J. 41.

(3) *Watt* v. *Thomas* [1947] 1 All E.R. 582.

FEDERAL COURT.

P. Cumaraswamy for the appellant.

Khaw Chay Tee for the respondents.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the Court): We allowed the appeal and stated we would give our reasons later. We do so now.

By an oral agreement made in March 1973 respondents agreed to purchase 2,400 pieces of plastic brushes to be imported from Taiwan at $1.80 per piece. Pursuant to the agreement respondents gave appellant two cheques of $1,500 and $2,820 totalling $4,320 being the purchase price of the brushes. Sometime in June 1973 the brushes arrived from Taiwan. On examining the brushes at appellant's premises respondents found most of the brushes had been damaged or broken. So, they refused delivery of the brushes. The brushes were kept in appellant's warehouse until November 1973 when respondents through their solicitors demanded delivery. Appellant acceded to the request and made delivery. Out of 2,150 brushes, respondents alleged, only 250 were in good condition. Respondents demanded for the return of the purchase price. Appellant refused. Hence the action.

Appellant did not deny the oral agreement between them but stated that the oral agreement was for them jointly to make the purchase of 4,200 brushes

from Taiwan and that appellant was to arrange for the purchase and delivery of the brushes from Taiwan and respondents' share was 2,420 brushes. Respondents paid $4,320 for the brushes. Appellant admitted that some brushes were damaged or broken but not to the extent as alleged by respondents.

The learned Senior President of Sessions Court was clearly aware of the conflicting evidence between the two parties. She had the opportunity of seeing and hearing the witnesses and would be in a better position to assess their credibility. It is conceded even by counsel for respondents that an appellate court should not interfere with the finding of facts by the lower court. However, he contended that where the lower court made inferences from facts then the appellate court can interfere. He submitted that whether there was a contract or not the relationship between the parties is a question of law. This is to be inferred from the facts found at the trial. Respondents cited *Benmax* v. *Austin Motor Co. Ltd.*[1] The headnotes read: —

"An appellate court, on an appeal from a case tried before a judge alone, should not lightly differ from a finding of the trial judge on a question of fact but a distinction in this respect must be drawn between the perception of facts and the evaluation of facts. Where there is no question of the credibility of witnesses, but the sole question is the proper inference to be drawn from specific facts, an appellate court is in as good a position to evaluate the evidence as the trial judge, and should form its own independent opinion, though it will give weight to the opinion of the trial judge."

The learned Senior President of Sessions Court also pointed out the parties were businessmen whose main concern was to see that they made as much profit as they could from their transactions. In this case the fact was that both were paying $1.80 per brush and the appellant was not making any profit and asked respondents to buy the brushes out of friendship. The result is that the learned Senior President of the Sessions Court found that no relationship of buyer and seller existed between the parties. The claim was therefore dismissed.

The grounds of judgment were not available. The notes of proceedings are not sufficient to fathom into the reasoning of the learned judge. On the question of principles which an appellate court should act in reviewing finding of fact, see *Chow Yee Wah & Anor.* v. *Choo Ah Pat.*[2] The absence of grounds make it difficult to know the reasons for the learned judge in upsetting the finding of facts by the lower court.

It may be useful to refer to *Watt* v. *Thomas*[3] where Lord Thankerton laid down the following principles: —

"I. Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.

II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.

III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

The learned Senior President of Sessions Court could easily have taken an easy course instead of going into details regarding the evidence. She could have said that the evidence by each party was very unsatisfactory making it difficult to say which side she was to believe. The onus rested upon the plaintiffs (respondents in this case) but they failed to discharge that onus so the claim was dismissed. Instead, she tried to sort out the truth and do justice to the parties. She had made specific finding of facts. We have found no misdirection. The learned judge should not have disturbed the finding of facts. Accordingly, we allowed the appeal with costs both here and the court below.

Appeal allowed.

Solicitors: *Shook Lin & Bok; Allen & Gledhill.*

WEE KEE PUAN v. OVERSEA-CHINESE BANKING CORPORATION LTD.

[F.C. (Wan Suleiman F.J., Salleh Abas F.J. & Hashim Yeop A. Sani J.) June 6 & July 30, 1981]

[Kota Bahru — Federal Court Civil Appeal No. 57 of 1980]

Banking — Overdraft facility given by bank — Account dormant — Claim for repayment — Claim statute-barred — Letter acknowledging loan not pleaded — Limitation Ordinance, 1953, s. 6.

Limitation — Claim Statute barred — Letter of acknowledgement not pleaded — Limitation Ordinance, 1953, s. 6.

In this case the appellant had been granted an overdraft facility in 1963 by the respondent bank up to the limit of $25,000 and his late father stood surety by charging his lands in favour of the respondent. The last entry in the appellant's account was on September 8, 1965 when the appellant paid into the account a sum of $200. Since then the account became dormant. The estate of the father, who had died, was administered by the Official Administrator. On January 31, 1973 a demand for the settlement of the debt was made and the respondent obtained an order for the sale of the charged lands to recover the guaranteed sum of $25,000 and interest. This sum was eventually paid by the Official Administrator.

While the respondent's claim was pending the appellant wrote to the respondent's solicitors requesting postponement of the originating summons brought by the respondent.

The learned trial judge came to the conclusion that the debt was statute-barred but nevertheless gave judgment in favour of the respondent because of the letter written by the appellant. The appellant appealed on the ground that the learned judge should not have taken the letter into consideration as it was not pleaded.

Held: (1) it is settled law that for the purpose of the statute of limitation as regards overdraft the cause of action against the borrower arises everytime an advance is made by the bank and that no demand for repayment is necessary for the accrual of the cause of action, unless there is a term in the overdraft agreement requiring such notice;

(2) by the time the writ was taken out on June 16, 1975 it was three months short of ten years and the suit was thus caught by section 6 of the Limitation Ordinance, 1953;

(3) the letter constituted a new cause of action and should have been pleaded in the Statement of Claim;

(4) as it was not pleaded the appellant was entitled to judgment, because the debt having been statute-barred, the statement of claim disclosed no cause of action.

Cases referred to:-

(1) *Parr's Banking Co. Ltd.* v. *Yates* [1898] 2 Q.B. 460.